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SQUARE MILE CAPITAL MANAGEMENT LLC  
8 AND POST INVESTORS LLC

9 UNITED STATES BANKRUPTCY COURT

10 NORTHERN DISTRICT OF CALIFORNIA

11 SAN FRANCISCO DIVISION  
12

13 In re  
14 POST STREET, LLC,  
15 Debtor.  
16

Case No. 11-32255-TEC

Chapter 11

17 FESTIVAL RETAIL FUND 1 228 POST  
18 STREET, LLP, POST STREET, LLC

Adversary Proceeding Case No. 11-03143

19 Plaintiff,  
20

**REQUEST FOR JUDICIAL NOTICE IN  
SUPPORT OF DEFENDANTS SQUARE  
MILE CAPITAL MANAGEMENT LLC'S  
AND POST INVESTORS LLC'S MOTION  
TO DISMISS PLAINTIFFS' COMPLAINT**

21 v.

22 EUROHYPO AG aka EUROHYP AG,  
NEW YORK BRANCH; POST  
23 INVESTORS, LLC; SQUARE MILE  
CAPITAL MANAGEMENT LLC; FIRST  
24 AMERICAN TITLE INSURANCE  
COMPANY,

**Hearing:**

Date: September 2, 2011  
Time: 10:00 a.m.  
Dept.: Courtroom 23, 23rd Floor

25 Defendants.  
26  
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1 Defendants Post Investors LLC (“Post Investors”) and Square Mile Capital  
2 Management LLC (“Square Mile,” together with Post Investors, the “Square Mile Defendants”)  
3 respectfully submit this request for judicial notice pursuant to Federal Rule of Evidence 201 of  
4 the documents listed below in support of their Motion to Dismiss the Complaint of plaintiffs Post  
5 Street, LLC (“Post Street”) and Festival Retail Fund I 228 Post Street, LP (“Festival,” together  
6 with Post Street, “Plaintiffs”). The Square Mile Defendants request that the Court take judicial  
7 notice of the following documents:

8 1. The July 24, 2007 Loan Agreement between Festival as Borrower, the  
9 Lender Parties and Eurohypo AG, New York Branch (“Eurohypo”) as Administrative Agent (the  
10 “Loan Agreement”), a copy of which is attached as Exhibit A to the Declaration of Sean T.  
11 Strauss in Support of the Square Mile Defendants’ Motion to Dismiss Plaintiffs’ Complaint (the  
12 “Strauss Decl.”), filed herewith. Judicial notice of this document is proper as the Loan  
13 Agreement provides the foundation of Plaintiffs’ claims and is incorporated by reference into  
14 Plaintiffs’ Complaint. *See* Complaint ¶¶ 9, 11; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551  
15 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other  
16 sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular,  
17 documents incorporated into the complaint by reference”); *Dunn v. Castro*, 621 F.3d 1196, 1204  
18 n. 6 (9th Cir. 2010) (taking judicial notice of documents attached as exhibit to defendant's motion  
19 to dismiss where such document was referenced in the complaint and whose authenticity was  
20 unchallenged).

21 2. The July 24, 2007 Deed of Trust, Assignment of Leases and Rents Security  
22 Agreement and Fixture Filing made by Festival to Chicago Title Company – Los Angeles as  
23 Trustee for the benefit of Eurohypo (the “Deed of Trust”), a copy of which is attached as Exhibit  
24 B to the Strauss Decl. Judicial notice of this document is proper as the Loan Agreement provides  
25 the foundation of Plaintiffs’ claims and is incorporated by reference into Plaintiffs’ Complaint.  
26 *See* Complaint ¶¶ 9; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)  
27 (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily  
28 examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated

1 into the complaint by reference”); *Dunn v. Castro*, 621 F.3d 1196, 1204 n. 6 (9th Cir. 2010)  
2 (taking judicial notice of documents attached as exhibit to defendant's motion to dismiss where  
3 such document was referenced in the complaint and whose authenticity was unchallenged).

4           3.       The Notice of Default and Election to Sell Under Deed of Trust, Recording  
5 Requested by First American Title Insurance Company, recorded on January 6, 2011 (the “Notice  
6 of Default”), a copy of which is attached as Exhibit C to the Strauss Decl. Judicial notice of this  
7 document is proper as the Notice of Default provides the foundation of Plaintiffs’ claims, is  
8 incorporated by reference into Plaintiffs’ Complaint, and has been recorded with the San  
9 Francisco County Registrar-Recorder. *See* Complaint ¶ 18; *Tellabs, Inc. v. Makor Issues &*  
10 *Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as  
11 well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss,  
12 in particular, documents incorporated into the complaint by reference”); *Dunn v. Castro*, 621 F.3d  
13 1196, 1204 n. 6 (9th Cir. 2010) (taking judicial notice of documents attached as exhibit to  
14 defendant's motion to dismiss where such document was referenced in the complaint and whose  
15 authenticity was unchallenged); *Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1112  
16 (N.D. Cal. 2009) (taking judicial notice of foreclosure and other documents recorded in the  
17 county's official records).

18           4.       The Notice of Trustee’s Sale (Unified Sale) recorded by First American  
19 Title Insurance Company on April 11, 2011 (the “Notice of Trustee’s Sale”), a copy of which is  
20 attached as Exhibit D to the Strauss Decl. Judicial notice of this document is proper as the Notice  
21 of Trustee’s Sale provides the foundation of Plaintiffs’ claims, is incorporated by reference into  
22 Plaintiffs’ Complaint, has been recorded with the San Francisco County Registrar-Recorder. *See*  
23 Complaint ¶ 21; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts  
24 must consider the complaint in its entirety, as well as other sources courts ordinarily examine  
25 when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the  
26 complaint by reference”); *Dunn v. Castro*, 621 F.3d 1196, 1204 n. 6 (9th Cir. 2010) (taking  
27 judicial notice of documents attached as exhibit to defendant's motion to dismiss where such  
28 document was referenced in the complaint and whose authenticity was unchallenged); *Rosal v.*

1 *First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1112 (N.D. Cal. 2009) (taking judicial notice of  
2 foreclosure and other documents recorded in the county's official records).

3           5.       The Amended and Restated Cash Management and Security Agreement,  
4 dated as of December 21, 2007, among Festival, Post Street, Eurohypo, Lasalle Bank, N.A. as  
5 Depository Bank and Festival Management Corporation as Manager (the “Cash Management  
6 Agreement”), a copy of which is attached as Exhibit E to the Strauss Decl. Judicial notice of this  
7 document is proper as the Cash Management Agreement provides the foundation of Plaintiffs’  
8 claims and is incorporated by reference into Plaintiffs’ Complaint. *See* Complaint ¶¶ 13, 40(a);  
9 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider  
10 the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on  
11 Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by  
12 reference”); *Dunn v. Castro*, 621 F.3d 1196, 1204 n. 6 (9th Cir. 2010) (taking judicial notice of  
13 documents attached as exhibit to defendant's motion to dismiss where such document was  
14 referenced in the complaint and whose authenticity was unchallenged).

15           6.       The July 24, 2007 Assignment of Leases and Rents from Festival to  
16 Eurohypo recorded with the San Francisco Assessor-Recorder on July 26, 2007 (the “Assignment  
17 of Leases and Rents”), a copy of which is attached as Exhibit F to the Strauss Decl. Judicial  
18 notice of this document is proper as the Assignment of Leases and Rents provides the foundation  
19 of Plaintiffs’ claims, is recorded with the San Francisco Assessor’s Office and is related to the  
20 Loan Agreement and Deed of Trust. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308,  
21 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts  
22 ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents  
23 incorporated into the complaint by reference”); *Dunn v. Castro*, 621 F.3d 1196, 1204 n. 6 (9th  
24 Cir. 2010) (taking judicial notice of documents attached as exhibit to defendant's motion to  
25 dismiss where such document was referenced in the complaint and whose authenticity was  
26 unchallenged); *Rosal v. First Fed. Bank of Cal.*, 671 F. Supp. 2d 1111, 1112 (N.D. Cal. 2009)  
27 (taking judicial notice of foreclosure and other documents recorded in the county's official  
28 records).

1                   7.       Plaintiffs' June 1, 2011 Memorandum of Points and Authorities in Reply to  
2 the Square Mile Defendants' Opposition to Plaintiffs' Application for a Preliminary Injunction, a  
3 copy of which is attached as Exhibit G to the Strauss Decl. Judicial notice of this document is  
4 proper as the Court may take judicial notice of court records and Plaintiffs' statements made  
5 therein constitute judicial admissions. *See MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 504 (9th  
6 Cir. 1986) (on a motion to dismiss, taking notice of a motion to dismiss and supporting  
7 memorandum from a separate action); *Jardine v. Maryland Cas. Co.*, No. 10-3335 SC, 2011 WL  
8 1585065, at \*1 n.1 (N.D. Cal. Apr. 27, 2011) (same).

9                   8.       Plaintiffs' June 1, 2011 Memorandum of Points and Authorities in Reply to  
10 Defendant Eurohypo's Opposition to Plaintiffs' Application for Preliminary Injunction, a copy of  
11 which is attached as Exhibit H to the Strauss Decl. Judicial notice of this document is proper as  
12 the Court may take judicial notice of court records and Plaintiffs' statements made therein  
13 constitute judicial admissions.. *See MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 504 (9th Cir.  
14 1986) (on a motion to dismiss, taking notice of a motion to dismiss and supporting memorandum  
15 from a separate action); *Jardine v. Maryland Cas. Co.*, No. 10-3335 SC, 2011 WL 1585065, at  
16 \*1 n.1 (N.D. Cal. Apr. 27, 2011) (same).

17                   9.       The June 7, 2011 San Francisco Superior Court Order Denying Plaintiffs'  
18 Application for a Preliminary Injunction, a copy of which is attached as Exhibit I to the Strauss  
19 Decl. Judicial notice of this document is proper because it is a court order from an earlier related  
20 proceeding. *See Asdar Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290 n. 1 (9th Cir.  
21 1996) (court may take judicial notice of the pleadings and court orders in earlier related  
22 proceeding).

23                   10.       The June 14, 2011 First District Court of Appeal's June 14, 2011 Order  
24 denying Plaintiffs' petition for a writ of supersedeas and request for an emergency stay to  
25 foreclosure, a copy of which is attached as Exhibit J to the Strauss Decl. Judicial notice of this  
26 document is proper because it is a court order from an earlier related proceeding. *See Asdar*  
27 *Group v. Pillsbury, Madison & Sutro*, 99 F.3d 289, 290 n. 1 (9th Cir. 1996) (court may take  
28 judicial notice of the pleadings and court orders in earlier related proceeding).

1                    11.      Plaintiffs' July 6, 2011 Abandonment of Appeal, a copy of which is  
2      attached as Exhibit K to the Strauss Decl. Judicial notice of this document is proper as the Court  
3      may take judicial notice of court records. *See MGIC Indem. Co. v. Weisman*, 803 F.2d 500, 504  
4      (9th Cir. 1986) (on a motion to dismiss, taking notice of a motion to dismiss and supporting  
5      memorandum from a separate action); *Jardine v. Maryland Cas. Co.*, No. 10-3335 SC, 2011 WL  
6      1585065, at \*1 n.1 (N.D. Cal. Apr. 27, 2011) (same).

7      Dated: August 3, 2011

STEIN & LUBIN LLP

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9                    By: /s/ Sean T. Strauss

SEAN T. STRAUSS

Attorneys for Defendants

SQUARE MILE CAPITAL MANAGEMENT LLC

and POST INVESTORS, LLC

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